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MICHAEL RODAK, JR., CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1978

Nos.

78-1612

JOSEPH RONALD NELUMS,
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

JOSEPH (SIB) ABRAHAM, JR.,
CHARLES LOUIS ROBERTS

Attorneys for
JOSEPH RONALD NELUMS,
Petitioner
505 Caples Building
El Paso, Texas 79901

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The Petitioner, JOSEPH RONALD NELUMS, respectfully prays a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on February 7, 1979.

CITATIONS TO OPINIONS BELOW

The United States District Court for the Western District of Texas, El Paso Division entered its *Findings of*

Fact and Conclusions of Law, (RI 8, et seq.), on May 22, 1978, reproduced herein as Appendix A. Subsequently, the District Court entered its *Amended Findings of Fact and Conclusions of Law* on June 19, 1978, (RI 21, et seq.), reproduced herein as Appendix B.

Upon appeal to the United States Court of Appeals for the Fifth Circuit, this cause was joined with *United States v. Luddington*, which is now before this Court on a Petition for Certiorari, docket no. 78-6467. The Court of Appeals affirmed these two cases in a joint opinion reported at 589 F.2d 236 (5th Cir. 1979), reproduced herein as Appendix C. The Court of Appeals subsequently denied Petitioner Nelums' Petition for Rehearing on March 23, 1979, reproduced herein as Appendix D.

JURISDICTION

The judgment of the United States District Court was affirmed by the United States Court of Appeals for the Fifth Circuit. The Court of Appeals denied a Petition for Rehearing *En Banc* on March 22, 1979. This petition was timely filed on April 23, 1979, April 22 being a Sunday.

Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) and Supreme Court Rule 22.

QUESTIONS PRESENTED

- (1) Whether domestic traffic originating near the Mexican border can be defined as "international" traffic.
- (2) Whether any permanent border checkpoint which monitors a significant portion of domestic traffic can be characterized as a functional equivalent of the border.
- (3) Whether previously scrutinized international traffic can be utilized to justify a functional equivalent of the border further inland.
- (4) Whether the Sierra Blanca Checkpoint should be considered only a "permanent checkpoint" instead of a functional equivalent of the United States Border.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the Constitution guarantees that "The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, shall not be violated . . ."

STATEMENT OF FACTS

The Petitioner, JOSEPH RONALD NELUMS, was convicted of a single count which charged him with

violating 21 U.S.C. 841(a)(1), possession of marijuana with intent to distribute, (RI 20), this judgment of conviction and the resultant sentence was entered in Cause No. P-CR, 34, before the United States District Court of the Western District of Texas. (RI 11).

The Petitioner waived jury trial, and proceeded to trial before the Court on May 12, 1978 (Sup. RI 3). This case was joined with *United States v. Luddington*, P-78-CR-42, for the purposes of deciding their joint motions to suppress, (Sup. RI 3-4), which was acknowledged as being dispositive of both cases.

The Appellant JOSEPH RONALD NELUMS had been stopped at the border patrol checkpoint located at Sierra Blanca, Texas, which was manned by Border Patrol Officers (Sup. RI 41-42). The Court of Appeals for the Fifth Circuit described the search in its opinion as follows:

Appellant Joseph Nelums drove up to the Sierra Blanca checkpoint early in the evening of February 9, 1978, driving a 1977 MGB sports car with Texas license plates. Nelums was stopped, and pursuant to normal procedure at the checkpoint, was asked questions by a border patrolman concerning his citizenship. Nelums stated that he was an American traveling from El Paso, Texas, to Houston. Although the patrolman observed nothing suspicious or unusual about Nelum's

demeanor, the officer's curiosity was aroused by the presence of several articles of clothing in the passenger seat of the car and by an unusually clean, unused tire strapped to the chrome luggage rack on the trunk. Nelums was directed to open the trunk of the MGB, but the position of the luggage rack and tire prevented the trunk lid from opening more than four inches. Peering into the partially open trunk, the patrolman noticed several packages wrapped in plastic. Nelums was referred to a secondary inspection area where the spare tire was removed and the trunk opened, revealing 138 pounds of marijuana in brick form. Nelums was convicted in a non-jury trial on a single count of possession of marijuana with intent to distribute, in violation of 21 U.S.C. §841(a)(1), and sentenced to five years' probation and a \$1,000 fine. The trial court stated at the conclusion of the suppression hearing that it was "plain" that there was no probable cause and that, if the checkpoint was not the functional equivalent of the border, the search was improper. (S.R. 160). *United States v. Nelums*, 589 F.2d 236 (5th Cir. 1979), at 237.

The Sierra Blanca checkpoint is approximately 75-78 miles southeast of El Paso, Texas, on Interstate Highway 10, (RI 9). El Paso Interstate 10 parallels the United States-Mexico border in a southeasterly direc-

tion for approximately 50 miles, within two miles of the border at many places, (RI 9). Before reaching the checkpoint, Interstate Highway 10 turns in a north-eastern direction away from the border with the result that, at the checkpoint the highway runs east to west, (RI 9). There is no dispute as to these facts, (RI 9).

As regarded the Sierra Blanca checkpoint, the following facts were found by the District Court. The District Court further noted that some 28.5 million persons annually cross the border in the El Paso area through manned ports of entry, (RI 11, as amended, RI 25).

In response, Defendants NELUMS and LUDDINGTON presented the following facts which they contended militated against a functional equivalent status at the checkpoint:

(1) Interstate 10 is a major east-west highway which is preferred by private and commercial travelers because it is usually snow-free even in the winter months, (Sup. RI 105);

(2) Interstate 10 and its branch Interstate 20, serve many of the larger cities of this Country, including Los Angeles, Houston, Dallas, New Orleans, et cetera, (Sup. RI 98-100);

(3) At the Sierra Blanca checkpoint, Interstate 10 is utilized by approximately 2,751,000 eastbound

travelers annually, (Sup. RI 113), and the Border Patrol has no statistics which demonstrate that the majority are not purely domestic travelers, (Sup. RI 85-86);

(4) And, only 859 aliens and 113 narcotic smugglers were apprehended in 1977 at the Sierra Blanca checkpoint, (Sup. RI 83-84), the total of which, 972 aliens and smugglers, represents only .038% of the total annual traffic.

(5) At present, Sierra Blanca is the only "functional equivalent of the border" located on either Interstate 10 or Interstate 8 which traverse the southern portion of the United States, (Sup. RI 80);

(6) The United States Patrol maintains nine other checkpoints in the El Paso sector, none of which are presently characterized as "functional equivalents," (Sup. RI 88, 92);

(7) The Border Patrol is able to apprehend aliens and smugglers at the other El Paso sector checkpoints in spite of their lack of the "functional equivalent" status, (Sup. RI 93);

The United States Court of Appeals for the Fifth Circuit affirmed the judgment and conviction of this Petitioner, *United States v. Nelums, Supra.* in an opinion which affirmed the "functional equivalent" status of the Sierra Blanca checkpoint.

REASONS FOR GRANTING THE WRIT

When this Court initiated the modern era of border search law in *Almeida-Sanchez v. United States*, 413 U.S. 266, 272-73, 93 S.Ct. 2535, 37 L.Ed.2d 596 (1973), it raised as many issues as it settled. In *United States v. Brignoni-Ponce*, 422 U.S. 873, 95 S.Ct. 2574, 45 L.Ed.2d 607, (1975) and in *United States v. Martinez-Fuerte*, 428 U.S. 543, 96 S.Ct. 3074, 49 L.Ed.2d 1116, (1976), this Court dealt with the issues presented by roving patrol stops and permanent checkpoint stops. However, this Court has spoken on the issues raised by functional equivalents of the border. In this Court's silence, the Ninth Circuit and the Fifth Circuit have established conflicting standards as to these inland checkpoints where the Fourth Amendment is all but totally suspending. Consequently, the Constitutional rights of those citizens residing in or traveling through southwestern Texas are now considerably less than those enjoyed by their fellow citizens in southern California and Arizona. For this reason the Petitioner would ask this Court to address itself to the issue of functional equivalents of the border.

I

Whether Domestic Traffic Originating Near The Mexican Border Can Be Defined As "International" Traffic.

Before we analyze the conflicts between the Ninth Circuit and the Fifth Circuit as to their respective

standards regarding functional equivalents of the border, we must first turn to an innovative, but suspect change in the definition of "international" traffic adopted by the Fifth Circuit in *United States v. Alvarez-Gonzalez (II)*, 561 F.2d 620 (5th Cir. 1977) at 625, and reaffirmed in *United States v. Reyna (II)*, 572 F.2d 515 (5th Cir. 1978). In *Reyna*, the Fifth Circuit explained the change in definition and gave examples:

It is necessary to note that in determining whether traffic was of international origin, the district court adopted the definition formulated in *Alvarez-Gonzalez*, 561 F.2d at 625. In *Alvarez-Gonzalez*, the court included in the "international" category, those who had begun their journey in the immediate border area. In the instant case, the "immediate border area" was defined as the area south of U.S. 281 running parallel to the border. Thus, the international traffic measured includes not only those trips begun across the border, but also those whose origin was on the Texas shore of the Rio Grande. *Reyna (II)*, at 517.

In *Nelums*, the District Court found that the majority of traffic passing through the checkpoint was "international," citing *Alvarez-Gonzalez (II)*, *Supra.*, (Sup. RI 23, App. B). U.S. Interstate Highway 10 passes through El Paso which is a city which lies squarely on the shore of the Rio Grande, (See Maps, Def. Exhibits E, F, and G).

The Petitioner took strong issue with this novel definition in the Court of Appeals, declaring:

The appellant also takes issue with the redefining of the term "international," especially if it is applied to El Paso, Texas.

* * *

If the Sierra Blanca checkpoint is justified as a functional equivalent of the border on the basis of such "international traffic" originating in El Paso, (*Finding of Fact No. 17, RI 11*), then any passenger car, bus, or airplane leaving El Paso will be making "international" trips subject to customs and border searches when they arrive in the United States, that is, the "real United States." If traffic beginning in El Paso is considered "international" then El Paso will sink below our southern border for Fourth Amendment purposes. *Appellant's Brief*, pp. 23-24.

The Petitioner contends that this suspect definition of "international" poses a grave threat to the constitutional rights of the inhabitants of El Paso, Texas; Chula Vista, California; Buffalo, New York; and other communities located on or near our nation's borders.

Whether Any Permanent Border Checkpoint Which Monitors A Significant Portion Of Domestic Traffic Can Be Characterized As A Functional Equivalent Of The Border.

A. *The Ninth Circuit Standards*

In reaching its decision that the border patrol checkpoint on California State Highway 86 was not a functional equivalent of the border, the Court of Appeals for the Ninth Circuit, sitting *En Banc*, set the following standards:

In other words, if a search takes place at a location where virtually everyone searched has just come from the other side of the border, the search is a functional equivalent of a border search. In contrast, if a search takes place at a location where a significant number of those stopped are domestic travelers going from one point to another within the United States, the search is not the functional equivalent of a border search. One need only contemplate the volume of domestic travel between Buffalo and Rochester, New York, to see why a checkpoint between those two cities could not be the functional equivalent of a border checkpoint even though the checkpoint could be less than twenty miles from an international border. *United States v. Bowen*, 500 F.2d 960 (9th Cir. 1975), at 965.

The Ninth Circuit then held that the highway 86 checkpoint could not be a functional equivalent of the border in large part because, ". . . the border patrol agents had no reason to believe that virtually all or even most of the cars passing through their checkpoint had recently, or ever, crossed the border." In *Nelums*, the Petitioner drew the following admission from the senior patrol officer testifying:

Q. In other words, the Border Patrol has no statistics on the amount of people who have gone up to the Sierra Blanca checkpoint and have recently crossed the border or not recently crossed the border, is that right?

A. No, sir, we don't.

Q. So statistically, there's no evidence that you have that would refute the contention that a majority of travelers are domestic travelers?

A. I have nothing to refute it, no. (Sup. RI 85-86).

This Petitioner presented the holding in *Bowen*, *Appellant's Brief*, p. 20 together with the above evidence, which was found by this District Court as *Finding of Fact* no. 10, (RI 8, et seq.), but to no avail.

The Petitioner would also note that the United States Court of Appeals for the Second Circuit has adopted a similar test to protect Fourth Amendment rights in border areas. In *United States v. Barbera*, 514 F.2d

294 (2nd Cir. 1975), that Circuit held that a bus trip paralleling the border was not an international bus trip for functional equivalency purposes.

We hold that the search here was not at the *Almeida-Sanchez* plurality's "functional equivalent" since the existence of a sizeable city, Massena, and the nonstop travel of the bus therefrom, breaks the path from border to checkpoint. Although Malone does mark a confluence of Routes 30, 37, and 11, the fact that each of these roads either traverses the border or meets with other roads traversing the border before reaching Malone, makes it impossible for us to regard this entire city as the functional equivalent of the border under *Almeida-Sanchez*. *United States v. Barbera*, 514 F.2d 294 at 299.

B. The Fifth Circuit Standards

In arriving at its own standards, the Fifth Circuit expressly disagreed with the Ninth Circuit's holding in *Bowen*, *United States v. Alvarez-Gonzalez (I)*, 542 F.2d 226 (5th Cir. 1976), at 229. The Court then established a three part test which included: (1) the "relative permanence of the checkpoint"; (2) "minimal interdiction by the checkpoint of the flow of domestic traffic"; (3) "the practical necessity of the substitution of the interior checkpoint for the border in order to monitor international traffic," *United States v. Nelums*, 589 F.2d 236, at 240.

In deciding this cause, the Fifth Circuit admitted that its prior determination that Sierra Blanca was a functional equivalent, *United States v. Hart*, 506 F.2d 887, vacated and remanded, 422 U.S. 1053, 95 S.Ct. 2674, 45 L.Ed.2d 706, reaff'd 525 F.2d 1199 (5th Cir. 1976) (on remand) cert. denied, 428 U.S. 923, 96 S.Ct. 3234, 49 L.Ed.2d 1226 (1976), neglected the domestic traffic issue:

Only the first and third factors of the currently operative three-part test were applied to the Sierra Blanca checkpoint in *Hart*. *Hart* found that (1) the checkpoint facility was relatively permanent and continuous in its operation, and (2) the physical location of the checkpoint was a practical necessity as a substitute for several checkpoints actually located at the border. 506 F.2d at 896-97; *Nelums*, at 240.

And in stark conflict with the Ninth Circuit, the Fifth Circuit analyzed the statistics presented to it by this Petitioner, and found:

There is no disputing the assertion that as a matter of sheer volume, the effect of the checkpoint on domestic traffic is significant. The Texas Highway Department estimated that 2,700,000 people per year pass eastward through the checkpoint. Interstate 10 is one of the major arteries of the interstate highway

system, stretching coast to coast from Los Angeles to Jacksonville, Florida. Interstate 10 is a route of preference for truckers, bus drivers, and other travelers because it is snow- and ice-free virtually the year round. *Nelums*, at 241.

This finding would have required the Ninth Circuit to hold that the checkpoint could not be a functional equivalent, yet the Fifth Circuit affirmed, citing *Bowen*, in spite of this finding. Thus, the conflict between these two circuits is real and apparent.

The Petitioner argues that the standards set down by the Ninth Circuit should be tests applied across the nation, because the Fifth Circuit test is highly unbalanced against the Constitution. The Ninth Circuit's holding in *Bowen*, would tip the scales in favor of not suspending Fourth Amendment rights when a significant amount of "domestic travelers" are being affected, *Bowen, Supra.*, at 965. Even after acknowledging an annual traffic flow of 2,700,000 persons as against an annual apprehension of only 859 aliens and 113 smugglers, (Sup. RI 83-84; *Finding of Fact no. 21*, RI 8 et seq.), the Fifth Circuit tipped the balance in favor of the suspension of Fourth Amendment rights at the checkpoint. Thus, our case illustrated the real problem with the Fifth Circuit standards, the Fourth Amendment rights of three million persons can be overcome by the illegal activities of only

.038% of their number. It is unimaginable to this Petitioner, that our Constitution, which was won at so great a cost, should lose in the balance against such an infinitesimally small counterweight.

III

Whether Previously Scrutinized International Traffic Can Be Utilized To Justify A Functional Equivalent Of The Border Further Inland.

While acknowledging that some 2,700,000 persons pass annually through the Sierra Blanca Checkpoint, the Court of Appeals justified the checkpoint's functional equivalency status by noting:

What statistics do exist indicate that over 2 million persons per month cross the border from Mexico in the El Paso sector at established Ports of Entry. (Emphasis in Original) *Nelums*, at 241.

The Petitioner would point out that this international traffic occurring some 80 miles from the Sierra Blanca Checkpoint and existing at the pleasure of the United States cannot be utilized to support a functional equivalent of the border because this traffic is counted and monitored traffic going through *Manned Ports of Entry*.

"14. The above figures are crossings from Mexico into the United States at the above checkpoint during the manned operational hours." (RI 25)

Functional Equivalents of the border are so designated in order to monitor previously unscrutinized international traffic. If one trip through immigration and customs was not sufficient, then the United States could establish functional equivalents throughout the width and breadth of this Country to check and re-check previously monitored traffic. Can it be that traffic, once international, can never obtain or regain a domestic character, regardless or whether it passes through customs and immigration?

IV

Whether The Sierra Blanca Checkpoint Should Be Considered Only A "Permanent Checkpoint" Instead Of A Functional Equivalent Of The United States Border.

In the Court of Appeals, the Petitioner argued that the Sierra Blanca checkpoint should be a permanent checkpoint, not a functional equivalent of the border, *Appellant's Brief*, p. 26-29. The Petitioner presented numerous facts in support of this position, and now submits them in summary form to this Court:

1. Interstate 10 is a major east-west highway which is preferred by private and com-

mercial travelers because it is usually snow-free even in the winter months, (Sup. RI 105);

2. Interstate 10 and its branch Interstate 20, serve many of the larger cities of this Country, including Los Angeles, Houston, Dallas, New Orleans, et cetera, (Sup. RI 98-100);
3. At the Sierra Blanca checkpoint, Interstate 10 is utilized by approximately 2,-751,000 eastbound travelers annually, (Sup. RI 113), and the Border Patrol has no statistics which demonstrate that the majority are not purely domestic travelers, (Sup. RI 85-86);
4. And, only 859 aliens and 113 narcotic smugglers were apprehended in 1977 at the Sierra Blanca checkpoint, (Sup. RI 83-84), the total of which, 972 aliens and smugglers, represents only .038% of the total annual traffic.
5. At present, Sierra Blanca is the only "functional equivalent of the border" located on either Interstate 10 or Interstate 8 which traverse the southern portion of the United States, (Sup. RI 80);
6. The United States Patrol maintains nine other checkpoints in the El Paso sector, none of which are presently characterized

as "functional equivalents," (Sup. RI 88, 92);

7. The Border Patrol is able to apprehend aliens and smugglers at the other El Paso sector checkpoints in spite of their lack of the "functional equivalent" status), (Sup. RI 93);

All of the above facts were found by the District Court in its *Findings of Fact*, (RI 8, et seq.) and *Amended Findings of Fact*, (RI 23, et seq.), reproduced herein as appendices A and B. The Fifth Circuit failed to take issue with any of these facts, but still found in favor of functional equivalency, *Nelums, Supra*.

It is this Petitioner's contention, that the permanent checkpoint procedures as outlined and evaluated by this Court in *Martinez-Fuerte, Supra*:

While the need to make routine checkpoint stops is great, the consequent intrusion on Fourth Amendment interests is quite limited. The stop does intrude to a limited extent on motorists' right to "free passage without [428 U.S. 558]

interruption."

Carroll v United States, 267 U.S. 132, 154, 69 L Ed 543, 45 S Ct 280, 39 ALR 790 (1925), and arguable on their right to personal security. But it involves only a brief detention of travelers during which

"'[a]ll that is required of the vehicle's occupants is a response to a brief question or two and possibly the production of a document evidencing a right to be in the United States.'" *United States v Brignoni-Ponce, supra*, at 880, 45 L Ed 2d 607, 95 S Ct 2574.

Neither the vehicle nor its occupants are searched, and visual inspection of the vehicle is limited to what can be seen without a search. 428 U.S. at 557-559.

are sufficient to carry out the mission of the Sierra Blanca checkpoint, yet protect the Fourth Amendment rights of the almost three million travelers who annually pass through it.¹

CONCLUSION

This case does not involve a muddle of conflicting facts. The facts found by the District Court, reproduced herein as Appendix A and B, were not disputed by the Court of Appeals, *Nelums, Supra*. With the exception

¹ Parenthetically, it must be noted that the San Clemente checkpoint found to be a valid permanent checkpoint by this Court in *Martinez-Fuerte* had a "0.12%" apprehension rate, as against total traffic, *United States v. Martinez-Fuerte*, 514 F.2d 308 (9th Cir. 1975), at 314. At Sierra Blanca, the apprehension rate as against total traffic was only .038%, including both aliens and contraband smugglers, (Sup. RI 113; 83-84). Also, the lower figure at the Sierra Blanca checkpoint was achieved through a greater intrusion upon the Constitution rights of the persons affected, non-probable cause searches and seizures.

of *Finding of Facts* numbers 17-19, which were predicated upon the Fifth Circuit's novel definition of "international," (RI 11; as amended RI 25), the facts are also accepted by the parties. Thus, this Court can reach the issues in this case without a preliminary finding of what the real facts are.

And the Petitioner contends that these issues are important enough to deserve consideration of this Court. In this cause, we are dealing with the Fourth Amendment rights of almost millions of travelers along an interstate highway and of the almost four hundred thousand residents of El Paso, Texas. As it stands now, under the opinion of the United States Court of Appeals for the Fifth Circuit in our cause, a resident of El Paso must cross the border to visit the eastermost half of the United States. Likewise, a traveler going from Los Angeles, California to New Orleans, Louisiana on U.S. Interstate 10 crosses the Mexican border whether he wishes to or not. Both are treated at the Sierra Blanca checkpoint as if they had just left the Republic of Mexico. The Fifth Circuit's opinion must be particularly vexing to the residents of El Paso, Texas since they lived in an area defined as "international" by the law of that Circuit in spite of the fact that the flag that flies over that is clearly not of the Republic of Mexico.

As there is no doubt as to the importance of the issues involved here, the existence of sharp Circuit conflict is also clear. The Ninth Circuit in *Bowen, Supra*, holds that no checkpoint that interferes with a signifi-

cant number of domestic travelers may be considered a functional equivalent of the border. Contrarily, the Fifth Circuit held in *Nelums, Supra.*, that the Sierra Blanca checkpoint is a valid, functional equivalent of the border in spite of the fact that the Court admitted that the checkpoint had a significant effect on domestic traffic. In real terms, this conflict simply means that residents and travelers in southwestern Texas have less Fourth Amendment rights than their brethren to the west, in southern California and Arizona. If the Constitution is truly a national document, then its mantle must fall evenly over our whole nation.

The Petitioner asks this Court to his cause, confident that once that cause is heard, that this Court will lead the millions of people involved back across the border into that part of the United States that is under the fall of its Constitution.

Wherefore, the above premises considered, the Petitioner prays that this Court grant a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

JOSEPH (SIB) ABRAHAM, JR.

CHARLES LOUIS ROBERTS
Attorney for Petitioner
505 Caples Building
El Paso, Texas 79901
(915) 532-1601

CERTIFICATE OF SERVICE

The undersigned attorney of record for Petitioner, JOSEPH RONALD NELUMS, hereby certifies as follows:

- (a) That I am a member of the bar of the United States Supreme Court, and that I have duly served all parties required by the Rules of said Court to be served with the foregoing Petition for Writ of Certiorari, as hereinafter shown:
- (b) That the names and addresses of the attorneys of record for the adverse party are as follows:

The Honorable Wade H. McCree, Jr.
Solicitor General of the United States
Department of Justice
Washington, D.C. 20530

Jamie Boyd
United States Attorney
U.S. Attorney's Office
655 E. Durango Blvd.
Hemisfair Plaza
San Antonio, Texas 78206

- (c) That on this day I served three printed copies of the foregoing Petition for Writ of

Certiorari on the said Wade H. McCree, Jr., and the said Jamie Boyd, attorneys for said Respondent, by depositing same in the United States post office, with first class postage prepaid, properly addressed to said attorneys for Respondent at their said addresses.

EXECUTED, this 20th day of April, 1979.

JOSEPH (SIB) ABRAHAM, JR.

CHARLES LOUIS ROBERTS
Attorney for Petitioner
505 Caples Building
El Paso, Texas 79901
(915) 532-1601

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
PECOS DIVISION

UNITED STATES OF AMERICA

versus NO. P-78-CR-34

JOSEPH RONALD NELUMS

FINDINGS OF FACT AND CONCLUSIONS OF LAW

On the 12th day of May, 1978, the right to trial by jury having been waived by Defendant in open Court, the cause was regularly called on the docket for hearing on Defendant's Motion to Suppress the Evidence and for Trial before the Court. Thereafter, the Court having duly considered the evidence and the summation of counsel and the applicable law, hereby makes its Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

Circumstances Leading to Search

1. The Defendant, JOSEPH RONALD NELUMS, driving a yellow-orange, two-seated MGB sports car, approached the United States Border Patrol checkpoint approximately four miles west of Sierra Blanca, Texas, at approximately 6:00 P.M. on February 9, 1978.

2. A United States Border Patrolman then on duty, Agent John D. Neal, stopped the Defendant at the large "stop" area and inquired of the Defendant, a young man in his early twenties with olive skin and dark curly hair, concerning Defendant's citizenship. Defendant informed Agent Neal that he was an American citizen traveling from El Paso, Texas, to Houston, Texas. Agent Neal noted nothing suspicious about Defendant's declaration of citizenship or Defendant's declaration concerning his journey.

3. Agent Neal noted that the Defendant was smiling and friendly, that there was nothing unusual or suspicious about Defendant's automobile with the exception of the fact that there was an unusually clean, unused tire tied, by rope, to the chrome luggage rack on the trunk of Defendant's automobile.

4. Agent Neal noted that there were certain items of clothing in the passenger seat beside the Defendant, and felt that it was unusual for Defendant to have the articles of clothing in the passenger seat rather than in the trunk.

5. The Defendant was instructed to open his trunk. The trunk would open only approximately four inches, as the opening of the trunk was restricted by the luggage rack and wheel mounted thereon. Agent Neal, upon looking into the partially open trunk, could see only two packages in the rear righthand corner of the trunk, both of which were wrapped in plastic.

6. Defendant was referred to the secondary inspection point where the spare tire was removed and the trunk was opened, revealing 138 pounds of marijuana in brick form, each brick measuring approximately 10 inches by 2½ inches by 3 inches.

7. Defendant was arrested, warned of his rights, and transported from the scene.

Nature of the Sierra Blanca Checkpoint and Surrounding Area

8. As to the physical description of the Sierra Blanca, Texas checkpoint, the surrounding area, and the area between the checkpoint and El Paso, Texas, the Court will adopt the description contained in the opinion of *United States v. Lawrence Edward Hart*, 506 F.2d 887 (5th Cir. 1975). The Court finds that the circumstances and description as set out in Paragraph 1, 2, 3, 4, 5, 6, and 7 on page 896 thereof remain the same to this date, except in two particulars, to wit: during the year preceding February 9, 1978, the checkpoint was in operation approximately 85% to 87% of the time, and the officials at the Sierra Blanca checkpoint apprehended 799 aliens in fiscal year 1975, 648 aliens in fiscal year 1976, and 859 aliens in fiscal year 1977.

9. The circumstances and description delineated in Finding of Fact No. 8, *supra*, indicate that the United States Border Patrol checkpoint at Sierra Blanca, Texas, has continued to be a permanent checkpoint as found by the Fifth Circuit in *United States v. Hufstetler*, 496

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F.2d 1184 (5th Cir. 1974), *United States v. McGlynn*, 496 F.2d 1316 (5th Cir. 1974), *United States v. Hart*, 506 F.2d 887 (5th Cir. 1975), 525 F.2d 1199 (5th Cir. 1976), and was, on February 9, 1978, a permanent checkpoint.

10. The El Paso sector of the United States Border Patrol contains eight checkpoints, other than the Sierra Blanca checkpoint, none of which have been found to be the functional equivalent of the border.

11. The Border Patrol in the El Paso sector keeps no statistical information differentiating domestic and international traffic, and no statistical data as to the relative proportion of domestic and international traffic.

12. The 1975 United States census estimate for the City of El Paso was 385,691.

13. The Texas Department of Highways estimated, through a factored sample, that 3,740 vehicles moved in an easterly direction traveling through the Sierra Blanca checkpoint during each 24-hour period.

14. During fiscal year 1977 (October 1, 1976 to September 30, 1977) the statistical information compiled by the Border Patrol shows the following crossings for vehicles and persons at the ports of entry between downtown El Paso and Ft. Hancock:

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Crossings	No. of Persons	No. of Vehicles
Ft. Hancock POE	7,099 per mo.	3,690 per mo.
Fabens POE	28,890 per mo.	15,377 per mo.
Ysleta POE	250,000 per mo.	121,113 per mo.
Bridge of the Americas POE	1,033,577 per mo.	681,000 per mo.
Paso Del Norte POE	1,068,769 per mo.	416,998 per mo.

15. Between the Ft. Hancock border crossing and the Sierra Blanca checkpoint, there are numerous footpaths, dirt roads, and partially paved roads which lead from the Texas-Mexico border directly to Interstate Highway 10. Additionally, there are numerous settlements in the Quitman Mountains immediately south of the Sierra Blanca checkpoint.

16. The proximity of the Sierra Blanca checkpoint to the border and the frequency with which persons living between El Paso and Ft. Hancock visit Mexico, support the assumption that a very high proportion of the persons traveling from the immediate border area to the Sierra Blanca Checkpoint have crossed the Mexican border within a short time before their journey through the Sierra Blanca checkpoint.

17. "International traffic" includes traffic whose journey to the checkpoint began in the immediate border area.

18. The majority of traffic passing through the Sierra Blanca checkpoint has its inception in the immediate border area.

19. The United States Border Patrol checkpoint at Sierra Blanca, Texas monitors predominantly international traffic.

20. Between 9:00 P.M. and 6:00 A.M. the Ft. Hancock Port of Entry and the Fabens Port of Entry are closed, leaving the Ysleta Port of Entry (70 miles west of the Sierra Blanca checkpoint) as the closest port of entry along the international boundary and therefore, the Sierra Blanca Port of Entry provides the first point at which the vehicles crossing the border east of the Ysleta Port of Entry receive scrutiny.

21. During the fiscal year 1977, from October 1, 1976 to September 30, 1977, 145,059 aliens were apprehended in the El Paso sector. Of that number, 3,284 were apprehended in the Sierra Blanca sector, 859 of which apprehensions occurred at the Sierra Blanca checkpoint itself. During that same period, 113 arrests were made for possession of narcotic or dangerous drugs at the Sierra Blanca checkpoint.

22. The Sierra Blanca checkpoint is the first location at which international traffic from areas of uncon-

trolled access to the Interstate Highway 10 receives scrutiny.

23. The Sierra Blanca checkpoint actually approaches the effect of a checkpoint physically located at the border, as it has a capability to monitor portions of international traffic not otherwise practically controllable. *United States v. Alvarez-Gonzales*, 542 F.2d 226, 229 (5th Cir. 1976), 551 F.2d 620, 624 (5th Cir. 1977). *United States v. Reyna*, (5th Cir., No. 76-1898, May 5, 1978.)

CONCLUSIONS OF LAW

1. The United States Border Patrol checkpoint at Sierra Blanca, Texas is a permanent checkpoint and is the functional equivalent of the border for immigration purposes. Because of the status of the Sierra Blanca checkpoint as the functional equivalent of the border, Border Patrol Officers who search Defendant's trunk do not require probable cause to do so. *United States v. Alvarez-Gonzalez*, 561 F.2d 620 (5th Cir. 1977).

2. On or about February 9, 1978, in the Western District of Texas, JOSEPH RONALD NELUMS, knowingly and intentionally possessed with intent to distribute approximately 138 pounds of marijuana, a Schedule I Controlled Substance.

May 22, 1978

8a

/s/ William S. Sessions
WILLIAM S. SESSIONS
United States District Judge

Filed 5-22-78
DAN W. BENEDICT, Clerk
/s/ GJS
Deputy

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
PECOS DIVISION

UNITED STATES OF AMERICA

versus No. P-78-CR-34

JOSEPH RONALD NELUMS

AMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW

On the 12th day of May, 1978, this cause was regularly called on the docket for hearing on the Defendant's Motion to Suppress the Evidence and for trial before the Court. Thereafter, the Court having duly considered the evidence and summation of counsel and

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the applicable law, rendered its Findings of Fact and Conclusions of Law in this cause, on May 22, 1978.

Subsequent to the Court's rendition of Findings of Fact and Conclusions of Law, the Defendant submitted to the Court additional Proposed Findings of Fact, Objections to some of the Court's Findings of Fact, and suggested clarifications of certain Findings of Fact. Defendant also requested an additional Conclusion of Law and objected to certain of the Court's Conclusions of Law.

I

Defendant's proposed additional Findings of Fact Nos. 1, 2, 3, 4, 5, 7, 9, and 10, are Findings which the Court deems to be supported by the evidence adduced at the hearing before the Court on May 12, 1978, and are Findings which the Court will include in its Findings of Fact and Conclusions of Law. Defendant's Requested Finding of Fact No. 6 will be modified to include the terms "per year", so that it will accurately reflect the number of persons per year passing through the Sierra Blanca checkpoint.

Defendant's Requested Finding of Fact No. 8 is a Finding of Fact which is already included in the Court's Finding of Fact No. 11, issued on May 23, 1978.

IT IS THEREFORE ORDERED that the Findings of Fact rendered by the Court on May 23, 1978, be

AMENDED by including the following Findings of Fact therein:

"24. U.S. Interstate Highway 10 is a transcontinental highway running east-west, parallel to the United States Mexican Border, from Los Angeles, California to Jacksonville, Florida.

"25. U.S. Interstate Highway 20 branches off U.S. Interstate Highway 10 east of the Sierra Blanca checkpoint and extends through the Dallas-Ft. Worth area to the East Coast of the United States.

"26. U.S. Interstate Highways 10 and 20 serve many large cities in the United States including: Los Angeles, Phoenix, Tucson, El Paso, San Antonio, Houston, Baton Rouge, New Orleans, Mobile, Jacksonville, Fort Worth, Dallas, Shreveport, Birmingham, Atlanta.

"27. U.S. Interstate Highway 10 is a route of preference for truckers, bus drivers, and other travelers because it is snow and ice free virtually year round.

"28. Through a factored sample, the Texas Highway Department estimates the average vehicle occupancy on Interstate Highway 10 in the Sierra Blanca area as approximately two persons per vehicle.

"29. Based on its estimates of daily traffic and vehicle occupancy, the Texas Highway estimated that in excess of 2,700,000 people per year pass eastward through the Sierra Blanca checkpoint on Interstate Highway 10.

"30. The Texas Highway Department estimates through a factored sample that approximately 50% of the passenger cars traveling eastward through the Sierra Blanca area on Interstate Highway 10 bear out-of-state license plates and 50% bear local (Texas) plates.

"31. Of the various Border Patrol checkpoints on U.S. Highways 10 and 8, which highways run parallel and close to the U.S.-Mexican Border, only the Sierra Blanca checkpoint has been designated as the functional equivalent of the border.

"32. The United States Border Patrol is able to apprehend aliens and narcotic smugglers at the other permanent checkpoints in the El Paso area which have not been accorded the status of functional equivalents of the border."

II

Defendant has requested clarification of the Court's Finding of Fact No. 14, and the Court finds that said request is well taken, and ORDERS that Finding of Fact No. 12 be AMENDED to state as follows:

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"14. The above figures are crossings from Mexico into the United States at the above checkpoint during the manned operational hours."

Defendant has requested that the Court's Finding of Fact No. 17 will be clarified, and it appearing to the Court that said request is well taken,

IT IS ORDERED that Finding of Fact No. 17 be AMENDED to state as follows:

"17. 'International traffic' includes traffic which began across the border and traffic which began in the area immediately adjacent to the border." *United States v. Alvarez-Gonzalez*, 561 F.2d 620 (5th Cir. 1977).

The Defendant requests that this Court's Finding of Fact No. 21 be clarified, and it appearing to the Court that said request is well taken,

IT IS ORDERED that Finding of Fact No. 21 be AMENDED to read as follows:

"21. During the fiscal year 1977, from October 1, 1976 to September 30, 1977, 145,059 aliens were apprehended in the El Paso Sector. Of that number, 3,284 were apprehended in the Sierra Blanca stations' area of responsibility, 859 of which apprehensions occurred at the Sierra Blanca checkpoint itself. During

13a

that same period, 113 arrests were made for possession of narcotic or dangerous drugs at the Sierra checkpoint."

III

Defendant has requested that the Court add a Conclusion of Law regarding the drastic curtailment of a person's Fourth Amendment right at the border or its functional equivalent.

The Court finds such a Conclusion of Law to be unnecessary in view of the fact that the Court has previously issued Conclusion of Law No. 1 stating the effect of the Court finding the Sierra Blanca checkpoint to be a functional equivalent.

IT IS THEREFORE ORDERED that Defendant's request for an additional Conclusion of Law be, and it is hereby in all things, DENIED.

June 19, 1978

/s/ William S. Sessions
WILLIAM S. SESSIONS
United States District Judge

Filed 6-19-78
Clerk

/s/ GJS
Deputy

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APPENDIX C

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

CHARLES LUDDINGTON,
Defendant-Appellant.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

JOSEPH RONALD NELUMS,
Defendant-Appellant.

Nos. 78-5394, 78-5412
Summary Calendar.*

United States Court of Appeals,
Fifth Circuit.

Feb. 7, 1979

Appeals from the United States District Court for
the Western District of Texas.

* Rule 18, 5 Cir.; see *Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York et al.*, 5 Cir. 1970, 431 F.2d 409, Part I.

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Before CLARK, GEE and HILL, Circuit Judges.

CHARLES CLARK, Circuit Judge:

The United States Border Patrol maintains a permanent immigration checkpoint facility on Interstate Highway 10 near Sierra Blanca, Texas. In *United States v. Hart*, 506 F.2d 887, vacated and remanded, 422 U.S. 1053, 95 S.Ct. 2674, 45 L.Ed.2d 706, reaff'd 525 F.2d 1199 (5th Cir. 1976) (on remand), cert. denied 428 U.S. 923, 96 S.Ct. 3234, 49 L.Ed.2d 1226, this court held that the Sierra Blanca checkpoint was the "functional equivalent of the border," thus authorizing the Border Patrol to conduct searches of vehicles traveling through the checkpoint without consent or probable cause. The two appellants in this consolidated appeal were both convicted for the possession of contraband found in their vehicles during searches at the checkpoint conducted without probable cause. Relying on *Hart* and on new evidence gathered at a hearing concerning the operation of the checkpoint, the district court held that the searches were valid because the checkpoint is the functional equivalent of the border. The appellants invite us to overrule *Hart* and revoke the Sierra Blanca checkpoint's legal status as the functional equivalent of the border. We decline the invitation and affirm both convictions.

I.

Appellant Joseph Nelums drove up to the Sierra Blanca checkpoint early in the evening of February 9,

1978, driving a 1977 MGB sports car with Texas license plates. Nelums was stopped, and pursuant to normal procedure at the checkpoint, was asked questions by a border patrolman concerning his citizenship. Nelums stated that he was an American traveling from El Paso, Texas, to Houston. Although the patrolman observed nothing suspicious or unusual about Nelums' demeanor, the officer's curiosity was aroused by the presence of several articles of clothing in the passenger seat of the car and by an unusually clean, unused tire strapped to the chrome luggage rack on the trunk. Nelums was directed to open the trunk of the MGB, but the position of the luggage rack and tire prevented the trunk lid from opening more than four inches. Peering into the partially open trunk, the patrolman noticed several packages wrapped in plastic. Nelums was referred to a secondary inspection area where the spare tire was removed and the trunk opened, revealing 138 pounds of marijuana in brick form. Nelums was convicted in a non-jury trial on a single count of possession of marijuana with intent to distribute, in violation of 21 U.S.C. §841(a)(1), and sentenced to five years' probation and a \$1000 fine. The trial court stated at the conclusion of the suppression hearing that it was "plain" that there was no probable cause and that, if the checkpoint was not the functional equivalent of the border, the search was improper. (S.R. 160).

Appellant Charles Luddington drove up to the Sierra Blanca checkpoint on the morning of February 21, 1978, in a 1971 Pontiac. When asked about his

citizenship, Luddington stated that he was an American, on his way to Houston from California. The border patrolman thought that Luddington appeared nervous, and asked Luddington to open the trunk of his car. In the trunk, a sawed-off shotgun was found wrapped in burlap among some garment bags. Luddington was convicted before the same district judge as Nelums of possession of an unregistered firearm in violation of 26 U.S.C. §§5861(c), 5871, and given a four-year suspended sentence with five years' supervised probation. As in Nelums' case, the district court found that there was no probable cause to support a search of the car's trunk. (R. 49).

The Nelums and Luddington cases were consolidated by the district court for a joint hearing on the single issue dispositive of both cases: whether the Sierra Blanca checkpoint should retain its judicially approved certification as the functional equivalent of the border.¹

¹ In Nelums' case, Nelums made certain self-incriminating statements to Border Patrol agents after the agents gave Nelums his *Miranda* warnings. If we did not determine that the Sierra Blanca checkpoint was the functional equivalent of the border, it would be necessary to decide whether the incriminating statements made by Nelums were the poisonous fruit of an illegal search or were instead purged of their primary taint by the intervening *Miranda* warnings. See *Brown v. Illinois*, 422 U.S. 590, 603-04, 95 S.Ct. 2254, 2261-62, 45 L.Ed.2d 416 (1975); *Wong Sun v. United States*, 371 U.S. 471, 488, 83 S.Ct. 407, 417, 9 L.Ed.2d 441 (1963). The issue was not reached by the trial court and because of our reaffirmance of *Hart* we do not reach it here.

In Luddington's case, the government's fall-back position below was that even if probable cause should have existed before Luddington could be ordered to open his trunk, Luddington actually

II.

The Sierra Blanca checkpoint was declared to be the functional equivalent of the border in *United States v. Hart*, 506 F.2d 887, vacated and remanded, 422 U.S. 1053, 95 S.Ct. 2674, 45 L.Ed.2d 706, reaff'd 525 F.2d 1199 (5th Cir. 1976) (on remand) cert. denied, 428 U.S. 923, 96 S.Ct. 3234, 49 L.Ed.2d 1226 (1976). Lawrence Hart was stopped at the Sierra Blanca checkpoint and asked about his citizenship. When directed to open the trunk of his car, 397 pounds of marijuana were found. Although this circuit had previously upheld the legality of trunk searches at the Sierra Blanca checkpoint, *United States v. McGlynn*, 496 F.2d 1316 (5th Cir. 1974); *United States v. Hufstetler*, 496 F.2d 1184 (5th Cir. 1974), *Hart* was the first case to uphold such a search based upon a finding that the checkpoint was the functional equivalent of the border.

The phrase "functional equivalent of the border" was used for the first time by the Supreme Court in *Almeida-Sanchez v. United States*, 413 U.S. 266, 272-73, 93 S.Ct. 2535, 2539, 37 L.Ed.2d 596 (1973). *Almeida-Sanchez* struck down roving border patrol searches made without probable cause, but differentiated such roving searches from searches at permanent checkpoints at the border itself or at its "functional equivalents." 413

opened his trunk voluntarily and the search was consensual. The trial court did not rule on the consent issue, although it did state that no probable cause existed. (R. 49). Again, we do not reach the issue because of our holding in the functional equivalency status of the checkpoint.

U.S. at 272, 93 S.Ct. at 2539. The Court cited as examples of "functional equivalents" "an established station near the border, at a point marking the confluence of two or more roads that extend from the border" and "a search of passengers and cargo of an airplane arriving at a St. Louis airport after a nonstop flight from Mexico City." 413 U.S. at 273, 93 S.Ct. at 2539.

"*Hart I*," reported at 506 F.2d 887, held that the Sierra Blanca checkpoint was the functional equivalent of the border as that term was used in *Almeida-Sanchez*. *Hart I* reached its conclusion with the following discussion:

The Sierra Blanca checkpoint is located approximately 75-85 miles southeast of El Paso, Texas, and 4 miles west of Sierra Blanca, Texas on Interstate Highway 10. Leaving El Paso Interstate 10 parallels the United States-Mexico border in a southeasterly direction for approximately 50 miles, coming within two miles of the border itself at many places. Before reaching the checkpoint, Interstate Highway 10 turns in a northeasterly direction away from the border with the result that, at the checkpoint itself, the highway runs in an east-west direction.

Along the 85 mile stretch of road between El Paso and the Sierra Blanca checkpoint, there are three ports of entry. The first is located at Ysleta, Texas, a suburb of El Paso. The second port of entry is located at Fabens, Texas, ap-

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proximately 30 miles southeast of Ysleta, and the third is situated at Fort Hancock, Texas, roughly 18 miles southeast of Fabens. Paralleling the border, the distance from the Fort Hancock port of entry to the Sierra Blanca checkpoint is about 30 miles.

The ports of entry at Fabens and Fort Hancock are opened at 6:00 a.m. and closed at 9:00 p.m. on a daily basis. When a port of entry is closed, a gate is positioned across the road to prevent traffic from proceeding. The fact that these ports are closed, however, does not mean vehicles or individuals cannot cross the border, inasmuch as there are numerous roads, both paved and dirt, which lead from the banks of the Rio Grande River, which marks the border, to Interstate Highway 10 and do not pass through a port of entry.

The Sierra Blanca checkpoint itself is situated 20 land miles and 14 air miles from the United States-Mexico border. Since July 8, 1973, the checkpoint has been manned 16 hours a day on weekdays and 24 hours a day on weekends, weather and manpower permitting. The hours of operation of the Sierra Blanca checkpoint are approximately 4:00 p.m. to 8:00 a.m.

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The purpose of the instant checkpoint is to detect and apprehend aliens who have entered the United States illegally. Between November 1, 1972, and November 30, 1973, officials at the Sierra Blanca checkpoint apprehended 1,291 such aliens. Although the Quitman Mountains are immediately south of the checkpoint, there are various paths and trails leading from the border, through the mountains, into the United States and to Interstate Highway 10.

The Sierra Blanca checkpoint is permanent in nature. Approximately one mile west of the checkpoint on Interstate Highway 10, there is a sign which reads, "Inspection station, all vehicles exit one mile." Somewhat closer to the checkpoint, between one-half and three-fourths of a mile west, a second sign reads, "Form one lane right." One thousand yards west of the checkpoint, a third sign states, "Inspection station, all vehicles right lane."

During the hours that the Sierra Blanca checkpoint is open, there are cones positioned in the highway which direct all traffic onto a paved access road to the checkpoint. At the checkpoint itself, there are three stop signs, two with flashing red lights, and a trailer mounted on blocks which the checkpoint officials use as an office. Although all vehicles

traveling east on Interstate Highway 10 pass through the checkpoint when it is in operation, the officials do not stop every vehicle and search for aliens. In practice the officials wave some cars and trucks through the checkpoint and stop others to question their occupants.

Certain of these many characteristics may be more important than others in establishing the Sierra Blanca checkpoint as a functional equivalent of the border. One, the checkpoint is permanent in nature. Two, all traffic is diverted through the checkpoint during its hours of operation just as all traffic would be channeled through a port of entry at the border itself. Three, the Sierra Blanca checkpoint operates during the hours when the ports of entry at Fabens and Fort Hancock are closed. Four, Interstate Highway 10 parallels the border for some 50 miles before turning northeast to the checkpoint and the highway comes within two miles of the border itself in many points. Five, there are numerous roads, paths, trails which lead from the border to Interstate Highway 10 which do not pass through any port of entry. And, six, during one thirteen-month period officials at the Sierra Blanca checkpoint apprehended 1,291 aliens who had entered the United States illegally. Cf. *United States v. Byrd*, 483 F.2d 1196, 1199, n. 7 (5th Cir. 1973), modified, 494

F.2d 1284 (5th Cir. 1974). We need not decide which of these factors are absolutely necessary in order to hold that the synergistic effect of these physical and operational characteristics elevates the Sierra Blanca checkpoint to the status of the border's functional equivalent for a §1357 search.

506 F.2d at 896-97. The Supreme Court vacated and remanded *Hart I* at 422 U.S. 1053, 95 S.Ct. 2674, 45 L.Ed.2d 706, for reconsideration in light of *United States v. Ortiz*, 422 U.S. 891, 95 S.Ct. 2585, 45 L.Ed.2d 623 (1975); and *United States v. Brignoni-Ponce*, 422 U.S. 873, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975).

Brignoni-Ponce, like *Almeida-Sanchez*, condemned roving border patrol stops made in the absence of specific articulable facts reasonably warranting suspicion that a vehicle contains illegal aliens. 422 U.S. at 884, 95 S.Ct. at 2582. The Court in *Brignoni-Ponce* limited roving patrol non-probable cause searches to "the border and its functional equivalents." *Id.* *Ortiz* dealt with a search at a permanent checkpoint on Interstate Highway 5 near San Clemente, California, 66 road miles north of the Mexican border. The government in *Ortiz* did not contend that the San Clemente checkpoint was the functional equivalent of the border. 422 U.S. at 892, 95 S.Ct. at 2586. *Ortiz* squarely held that even at permanent checkpoints border patrol agents could not search vehicles without probable cause unless the checkpoint was at the border or its functional equivalent. 422 U.S.

at 896-97, 95 S.Ct. at 2589. In neither *Brignoni-Ponce* nor *Ortiz* did the Supreme Court attempt to define the term "functional equivalent."

On remand in *Hart II*, 525 F.2d 1199, this court stated that nothing in *Brignoni-Ponce* or *Ortiz* caused it to doubt the validity of its original determination in *Hart I* that the Sierra Blanca checkpoint is the functional equivalent of the border, and it reaffirmed the validity of non-probable cause searches at the checkpoint. 525 F.2d at 1200. The Supreme Court denied certiorari. 428 U.S. 923, 96 S.Ct. 3234, 49 L.Ed.2d 1226.

III.

The appellants urge us to overrule *Hart* on the basis of intervening developments in the case law on functional equivalency and updated information on the operation of the Sierra Blanca checkpoint facility.

Since *Hart*, this circuit has adopted a tripartite test for determining whether functional equivalency status should be granted: the "relative permanence of the checkpoint; minimal interdiction by the checkpoint of the flow of domestic traffic; and the practical necessity of the substitution of the interior checkpoint for the border in order to monitor international traffic." *United States v. Reyna*, 572 F.2d 515, 517 (5th Cir. 1978) (Sarita, Texas checkpoint); *United States v. Alvarez-Gonzalez*, 542 F.2d 226, 229 (5th Cir. 1976) (remanding for findings), 561 F.2d 620, 621-22 (5th Cir. 1977) (on appeal from remand) (La Gloria, Texas checkpoint).

Only the first and third factors of the currently operative three-part test were applied to the Sierra Blanca checkpoint in *Hart*. *Hart* found that (1) the checkpoint facility was relatively permanent and continuous in its operation, and (2) the physical location of the checkpoint was a practical necessity as a substitute for several checkpoints actually located at the border. 506 F.2d at 896-97; see also *United States v. Alvarez-Gonzalez*, 542 F.2d 226, 229 (5th Cir. 1976) (interpreting the factors considered in *Hart*).

The record compiled in this case confirms both the permanence and strategic importance of the Sierra Blanca checkpoint. The checkpoint is now operated around the clock 7 days a week; it is closed down only when adverse weather makes the diversion of traffic a safety hazard or when a border patrolman does not report for his scheduled duty shift. The Rio Grande River, despite its imposing name, is not an obstacle to border crossings in the area to the west of Sierra Blanca. Here, the river can be easily driven, waded, or swum across at all times, and often has either no surface flow at all or merely a bare trickle. *Hart, supra*, 506 F.2d at 897; *Alvarez-Gonzalez, supra*, 561 F.2d at 625. In the 85-mile stretch from El Paso to the Sierra Blanca checkpoint, there are myriad opportunities to make surreptitious crossings of the river with ease. Many foot paths, dirt roads, and trails lead across the river without passing through Ports of Entry. Since Interstate 10 roughly parallels the river at a distance of 2 to 5 miles along the entire stretch from El Paso to the

checkpoint, however, all paths leading from the border eventually find their way to the highway. The purpose of the Sierra Blanca checkpoint is to interdict that illegal alien traffic which turns eastward into the heart of Texas after reaching the interstate. The checkpoint is located at a point where the interstate cuts through a pass in the Quitman Mountains. Furthermore, the mountains form a natural funnel through which east-bound traffic from the border areas must flow. One small road in the mountains can be taken to circumvent passage through the checkpoint, but the Border Patrol has planted sensors in the road to detect any traffic over that route.

We recently referred to the problem of illegal alien entry from Mexico as "staggering," *Alvarez-Gonzalez, supra*, 561 F.2d at 625. Short of physically patrolling the entire length of the Rio Grande, strategically well-located checkpoints are the most effective means of dealing with this serious problem. The Sierra Blanca checkpoint is obviously a vital deterrent to the flow of illegal alien traffic through its assigned area. There is ample evidence to support the district court's finding that "[t]he Sierra Blanca checkpoint actually approaches the effect of a checkpoint physically located at the border, as it has a capability to monitor portions of international traffic not otherwise practically controllable."

The only aspect of the current three-part test which *Hart* did not consider is the precise degree of interdic-

tion of domestic traffic. There is no hard data available on the ratio of domestic to international traffic traveling through the checkpoint, because the Border Patrol does not keep statistics on either the amount or the origination of traffic diverted from the regular roadway surface or, more importantly, the amount or origination of such traffic as is physically interdicted by being required to stop. The defendant's expert from the Texas Highway Department was able to provide some estimates of traffic patterns which passed the checkpoint, but no estimate of the actual ratio of domestic to international traffic was made. Faced with the paucity of firm information, but recognizing the significance of the issue, the district court entered virtually all of the raw data before it into its findings and then drew conclusions. We agree with the district court's approach and affirm its conclusion that the record does not justify overturning *Hart* and "decertifying" the checkpoint.

There is no disputing the assertion that as a matter of sheer volume, the effect of the checkpoint on domestic traffic is significant. The Texas Highway Department estimated that 2,700,000 people per year pass eastward through the checkpoint. Interstate 10 is one of the major arteries of the interstate highway system, stretching coast to coast from Los Angeles to Jacksonville, Florida. Interstate 10 is a route of preference for truckers, bus drivers, and other travelers because it is snow- and ice-free virtually the year round.

In the immediate area surrounding the Sierra Blanca checkpoint, however, it is likely that the majority percentage of traffic on the interstate is international. What statistics do exist indicate that over 2 million persons per month cross the border from Mexico in the El Paso sector at established Ports of Entry. The record, of course, does not reflect how many more illegal crossings occur outside of points of entry. The court found that "the proximity of the Sierra Blanca checkpoint to the border and the frequency with which persons living between El Paso and Ft. Hancock visit Mexico, support the assumption that a very high proportion of the persons traveling from the immediate border area to the Sierra Blanca checkpoint have crossed the Mexican border within a short time before their journey through the Sierra Blanca checkpoint." As we held in *Alvarez-Gonzalez*, international traffic for checkpoint testing purposes must include traffic originating close to the border but on the American side, since vehicles which remain in this country and await their illegal human cargo are a principal means of alien smuggling. 561 F.2d at 624. Finding that the "majority of traffic passing through the Sierra Blanca checkpoint has its inception in the immediate border area," the court held that the checkpoint monitors predominantly international traffic. Although firm statistical data was lacking, the conclusions of the district court are logical inferences drawn from the record.

IV.

Functional equivalency is to be determined by looking at the checkpoint's permanence, physical location, and degree of interdiction of domestic traffic. All three considerations must be factored into the equation; and no one factor alone is determinative. *Alvarez-Gonzalez*, *supra*, 542 F.2d at 229. Compare *United States v. Bowen*, 500 F.2d 960, 965 (9th Cir. 1974), *aff'd on other grounds*, 422 U.S. 916, 95 S.Ct. 2569, 45 L.Ed.2d 641. Given its unique geographic situation, the Sierra Blanca checkpoint meets two of the three factors without question. It is permanent and has every physical attribute required for functional equivalency. The third consideration, interdiction of purely domestic travel, is not equally self-proving. Nevertheless, the diversion of only eastbound traffic which has flowed parallel to the river for approximately 50 miles, and the further selective interdiction of only portions of that traffic, clearly indicate this test, too, has been met. Under these circumstances, the authority of *Hart* continues unimpaired by later reasoning or subsequent changes of fact, and the Sierra Blanca checkpoint retains its status as the functional equivalent of the border.

The convictions are

AFFIRMED.

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APPENDIX D

**United States Court of Appeals
Fifth Circuit**

**Office of the Clerk
March 23, 1979**

TO ALL PARTIES LISTED BELOW:

**NO. 78-5412 — U.S.A. v. JOSEPH RONALD
NELUMS**

Dear Counsel:

This is to advise that an order has this day been entered denying the petition () for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the petition () for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

**EDWARD W. WADSWORTH,
Clerk**

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**/s/ Sally Hayward
Deputy Clerk**

**cc: Messrs. Joseph Abraham, Jr.
Charles Louis Roberts
Ms. LeRoy Morgan Jahn**